

The Sale of Substantially all Assets Under Section 363 Within 60 Days of the Filing of the Petition.

- i. **Declaration of Counsel for Debtor-in-Possession.** In connection with any hearing to approve the sale of substantially all assets within 60 days of the filing of the petition, the request for an emergency hearing or the sale motion (“Sale Motion”) itself when regularly noticed, should be supported by a separate declaration by counsel for the debtor-in-possession covering the following points:
- (1) **Communications with Creditors.** A description of any written communications of the debtor with substantially all of the debtor’s creditors during the pre-petition reorganization process relating to the workout or sale process. Copies of letters should be attached. If letters contained confidential information, they need not be attached but the court may require in-camera inspection.
 - (2) **Communications with Shareholders or Partners.** A description of any written communications with substantially all of the debtor’s shareholders or partners of a partnership during the pre-petition reorganization process relating to the workout or sale process. Copies of letters should be attached. If letters contained confidential information, they need not be attached but the court may require in-camera inspection.
 - (3) **Creditors’ Committee.** If a Creditors’ Committee existed pre-petition, indicate the date and manner in which the committee was formed.
 - (4) **Counsel for the Committee.** If the pre-petition Creditors’ Committee retained counsel, indicate the date counsel was engaged and the selection process.
 - (5) **Sale Contingencies.** Statement of all contingencies to the sale agreement together with a copy of the agreement.
 - (6) **Creditor Contact List.** If no committee has been formed, a list of contact persons, together with fax and phone numbers for each of the largest 20 unsecured creditors.
 - (7) **Administrative Debts.** Assuming the sale is approved, an estimate of administrative debts to be incurred prior to closing and the source of payment for such debts.

- (8) **Proceeds of Sale.** An estimate of the gross proceeds anticipated from the sale together with an estimate of the net proceeds coming to the estate with an explanation of the items making up the difference.
- (9) **Debt Structure of Debtor.** A brief description of the debtor's debt structure, including the amount of the debtor's secured debt, priority claims and general unsecured claims.
- (10) **Disposition of Proceeds.** A statement setting forth, to the best of declarant's knowledge, the likely distribution of proceeds to secured claimants, administrative claimants, priority claimants and general unsecured creditors.
- (11) **Effect on Employment.** A statement setting forth, to the best of declarant's knowledge, the number of debtor's employees, if any, who will be retained by the buyer after the sale.

ii. **Affidavit of Responsible Individual for Debtor-in-Possession.** Counsel's declaration referred to in paragraph (a) above should be accompanied by an affidavit from the responsible individual, to the best of affiant's knowledge and belief, covering the following matters.

- (1) **Alternatives to Sale.** A summary description of the efforts, if any, to pursue other alternatives such as financing, capital infusion, etc., including the period of time involved and the results achieved.
- (2) **Marketing of Assets.** A summary description of the manner in which the assets were marketed for sale including the period of time involved and results achieved.
- (3) **Decision to Sell.** The date on which the debtor accepted the offer to purchase the assets.
- (4) **Asset Valuation.** Disclosure of the prior valuations, undertaken or commissioned by the debtor, within the last year, of the assets to be sold, if any (i.e., book value, appraisals, financial statements, etc.).

- (5) **Relationship of Buyer.** A statement identifying the buyer and setting forth, to the best of affiant's knowledge, all of the buyer's (including its officers, directors and shareholders) connections with the debtor, material connections with creditors, any other party in interest, their respective attorneys, accountants, the United States Trustee or any person employed in the office of the United States Trustee.
- (6) **Post Sale Relationship with Debtor.** A statement setting forth, to the best of affiant's knowledge, any relationship or connection the debtor (including its officers, directors, shareholders and employees) will have with the buyer after the consummation of the sale, assuming it is approved.
- (7) **Relationship with Secured Creditors.** If the sale involves the payment of all or a portion of secured debt(s), a statement of all material connections between debtor's officers, directors, employees or other insiders and each secured creditor involved (for example, release of insider's guaranty).
- (8) **Insider Compensation.** Disclosure of current compensation received by officers, directors, key employees or other insiders pending approval of the sale.

iii. **Declaration of Counsel for Creditors' Committee.** Where counsel has represented a pre-petition Creditors' Committee and anticipates representing the Official Creditors' Committee when appointed, counsel should submit a declaration covering the following points;

- (1) **Investigation of Committee and Counsel.** A description of the scope and results of any investigation into the debtor's affairs conducted by the Committee and/or its counsel.
- (2) **Communication with Creditors.** A description of any written communications of the Committee or its counsel with creditors during the pre-petition reorganization process relating to the workout or sale process. Copies should be attached. If letters contained confidential information, they need not be attached but the court may require in-camera inspection.
- (3) **Involvement in Sale.** A description of the Committee's and counsel's involvement in the negotiation of the sale.

iv. **Hearing and Notice Regarding Sale.**

- (1) Any motion to approve sale or bid procedures (“Sale Procedures Motion”) shall be filed with the Sale Motion. A hearing on the Sale Procedures Motion shall be held not less than 10 days before any auction or presentation of competing bids, unless such time is shortened by the court upon a showing of cause.
- (2) Any Sale Procedures Motion shall be accompanied by a declaration of counsel for the debtor-in-possession highlighting the following provisions:
 - (a) The time and place of the bidding process, and whether telephone participation will be permitted.
 - (b) The amount of any initial bid.
 - (c) The amount of any required overbid (overbid protection).
 - (d) The amount of subsequent bidding increments.
 - (e) Any “last look” or rights to match previous bids offered to any party.
 - (f) The amount and form of any required bid deposits, and the manner and timing of the return of bid deposits to unsuccessful bidders.
 - (g) The effect of the winning bidder’s failure to close (for example, loss of bid deposit; liability for other damages; obligations, if any, of the next highest bidder or other bidders to close).
 - (h) The parameters of due diligence investigation offered to prospective bidders.
 - (i) To the extent not covered above, a summary of the essential terms of any purchase agreement.
- (3) If no Sale Procedures Motion is filed, unless the court orders otherwise, all sales governed by these rules, including auctions or the presentation of competing bids, will occur at the hearing before the court.

- (4) The Notice of any Sale Procedure Motion sent to creditors and other parties in interest shall contain the information required by paragraph (d)(2).
 - (5) The notice sent to creditors and other parties in interest of the Sales Motion should contain the information required by paragraphs (a)(7) through (10) and (b)(1) through (8) above, in addition to any other matters normally set forth in a notice of sale.
- v. **Proposed Order Approving Sale.** A proposed order approving the Sale Procedures Motion and the Sale Motion should be provided to chambers 24 hours prior to the respective hearing.
- vi. **Good Faith Finding.** There must be an evidentiary basis for a finding of good faith under § 363(m). Evidence can be presented in the form of a declaration from the prospective purchaser.
- vii. **Competing Bids.** Unless otherwise provided in the Order approving Sale Procedures Motion, or unless the court orders otherwise, competing bids can be presented at the time of the hearing.
- viii. **Financial Ability to Close.** Unless the court orders otherwise, any competing bidder must be prepared to demonstrate to the satisfaction of the court its ability to consummate the transaction if it is the successful bidder.
- ix. **Damages Payable to Prospective Purchaser.**
 - (1) Whether denominated liquidated damages, breakup fee, topping fee or other designation, no damages of any kind are payable to a prospective purchaser or its agents absent approval of the court in the Order approving Sale Procedures Motion or otherwise.
 - (2) If a provision for damages is contained in the original purchase agreement, to be enforceable, the parties must disclose the provision, identify where it appears in the purchase agreement and obtain court approval for the provision separate from court approval of the general terms of the purchase agreement.

- (3) A request for the approval of a damage provision shall be supported by, in addition to any other required papers, a declaration from counsel for the debtor-in possession setting forth the precise conditions under which damages would be payable and the factual basis on which the seller determined the provision was reasonable. Counsel for the proposed buyer may, but is not required to, submit a similar declaration.